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8 MAR - 2 2015

9 U.S. BANKRUPTCY COURT, SDNY

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
MANHATTAN DIVISION

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IN RE:

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RESIDENTIAL CAPITAL, LLC, *ET*
AL.

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Debtors.)

) BANKRUPTCY CASE NO. 12-12020-MG
) CHAPTER 11
)
) Jointly Administered
) (Executive Trustee Services, Case No. 12-
) 12028)
)
)
) MOTION FOR REARGUMENT RE: ORDER
) ENTERED FEBRUARY 13, 2015
) [Claim No. 4445]
) Hearing Date: N/A
) Hearing Time: N/A

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Pursuant to Local Bankruptcy Rule 9023-1, Claimant Alan Moss respectfully
requests that the Court schedule re-argument regarding the Trust's 75th Omnibus Objection.
which was previously heard and argued on February 11, 2015.

Said Rule provides:

A motion for reargument of a court order determining a motion shall be
served within fourteen (14) days after the entry of the Court's order de-
termining the original motion, or in the case of a court order resulting

1 in a judgment, within fourteen (14) days after the entry of the judgment.
2 and, unless the Court orders otherwise, shall be made returnable within
3 the same amount of time as required for the original motion. The mo-
4 tion shall set forth concisely the matters or controlling decisions which
5 counsel believes the Court has not considered. No oral argument shall
6 be heard unless the Court grants the motion and specifically orders that
7 the matter be re-argued orally.

8 The Court, in arriving at its decision sustaining the objection of the Trust,
9 evidently relied on two cases: *Kachlon vs. Markowitz* (2008)168 Cal.App.4th 316 and *Perez vs.*
10 *Wells Fargo Bank* (2013, N.D. Cal.) 929 F.Supp.2nd 988. In *Kachlon*, a California appellate
11 court held that a trustee, as used in the context of California's deed of trust secured property
12 transaction scheme, cannot be sued for damages arising out of the performance of its
13 statutory duties absent a demonstration of "malice," and that such duties of a trustee in this
14 context were privileged. In *Perez*, the court, after reciting the statutory duties of a trustee,
15 held that the trustee was not a "nominal defendant," that therefore there was not complete
16 diversity and remanded the case back to state court.

17 Both of these cases assumed that the trustee was lawfully and legally
18 appointed, and therefore possessed all of the powers conferred upon it by statute. Indeed,
19 there is not a hint in these decisions that there was any legal challenge to the power of the
20 trustee to do anything. It simply was not an issue in the decisions. The question was whether
21 the trustee's actions were privileged.

22 It is respectfully submitted that these cases are inapposite to the instant claim.

23 The central issue in this claim, based as it is on the underlying lawsuit filed in
24 California, was, and is, that the trustee was negligent in not first determining if it had the
25 legal authority to do anything, not having been legally and lawfully appointed. The lawsuit
26 did not seek monetary damages for ETS's publication of the legal notices set forth in the

1 statute(which *Kachlon* held to be privileged)¹; rather, the lawsuit sought damages against
2 ETS for negligently failing to ascertain if it had the power to do anything as regards the
3 claimant—a process which would have taken less than a minute.

4 No language in *Kachlon* discussed the effect of a “putative” trustee, that is, an
5 entity which was illegally substituted in as a “trustee” but which was ineffective or illegal
6 because the substitution did not conform to the requirements of statute. Pointedly, the Trust
7 has admitted, both in its brief and at oral argument, that ETS was not properly made the
8 trustee because the entity which did file and record the substitution was not a “beneficiary”
9 at the time, and therefore had no power to effectuate the substitution.²

10 The apposite cases are the very few which discuss the effect of actions taken
11 by an entity acting as trustee, but which for a variety of reasons, no longer had the power of
12 a trustee to do anything. There are no reported cases that are factually “on all fours” with the
13 instant case. But the principle is the same: any act so done is of no force and effect.

14 The relevant controlling cases are *Dimock vs. Emerald Properties* (2000) 81
15 Cal.App.4th 868 and *Bank of America vs. La Jolla Group II*(2005) 129 Cal.App.4th 706.³ The Court
16 in *Dimock* stated: “...because Commonwealth had no power to convey his property, its deed
17 to Emerald was void as opposed to merely voidable.. That is, the Commonwealth deed was

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19 ¹ See Civil Code §2924 *et seq.*

20 ² It is noted that *Kachlon* was *not* followed in a Federal case, *Perreault vs. NDEX West, LLC*.
21 2011 WL 11682629. In the *Perreault* case, the plaintiff alleged violation of a subsection of
22 California Civil Code §2924, the same statute that Claimant herein alleges was breached by debtor.
23 and the Court allowed claims for negligence and negligence *per se* to proceed. In FN 9, the Court
pointed out that *Kachlon* did not protect the defendant because of any qualified privilege regarding
24 notices: “That authority does not, however, excuse [defendant’s] alleged failure to distribute funds
25 in the statutorily prescribed manner following a foreclosure sale.”

26 ³ See also other cases and authorities cited in this regard in claimant’s responding brief at
P. 10-12

1 a complete nullity with no force or effect as opposed to one which maybe set aside but only
2 through the intervention of equity.” In these two case, and their progeny, the California
3 Courts of Appeal held that an entity purporting to be a trustee, but who was improperly
4 substituted in contravention of statute⁴, had no power to do anything. Pointedly, neither of
5 these cases or cases thereunder, required any showing of “malice” in order to pursue the case.
6 That is because the basis of the *Kachlon* decision, the immunity provisions of California
7 Civil Code §2924 and the privilege provisions of California civil Code §47, were not
8 invoked.

9 The complaint upon which this claim is based alleges that ETS was negligent
10 in failing to ascertain whether it was properly made the trustee in this matter, and therefore
11 whether it had the power to do anything.⁵ But for this bankruptcy, this case would have
12 gone to a jury to decide if, as in all other negligence cases, a “reasonable” trustee would
13 simply assume it was properly substituted in as trustee, especially given the stakes involved.
14 or whether it acted unreasonably in not ascertaining whether it had the power to perform the
15 typical acts of a trustee. The allegations in the complaint, at Paragraph 29, are that “ETS
16 negligently failed to examine the chain-of-title of the subject property and negligently failed
17 to determine that it had in fact been legally and properly substituted in as trustee...”; further,
18 in Paragraph 31, “ETS breached the duty of care it owed to plaintiff.” As a direct and
19 proximate result of this negligence of ETS, plaintiff sustained damage. Paragraph 32.⁶

21 ⁴ See California Civil Code §2934a.

22 ⁵ See Complaint in Action No. 505386, Superior Court of California in and for the County of San
23 Mateo, attached as Exhibit One to Doc 7667, filed October 16, 2014.

24 ⁶ It is necessary to point out, although not discussed at oral argument, that, for the reasons
25 set forth in claimant’s brief, ETS defaulted in the underlying case, thereby admitting the allegations
26 of the complaint.

1 Pointedly, the complaint, and therefore the claim, did not seek damages for the
2 publication of statutorily required notices, but rather for failing to ascertain its status.

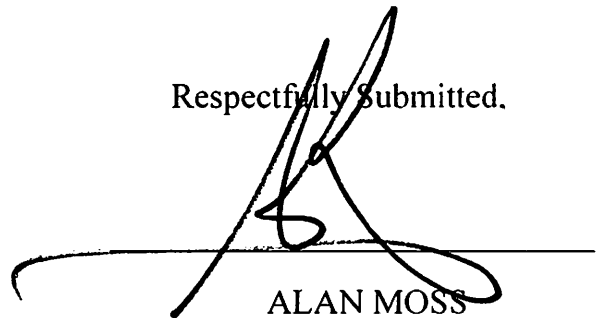
3 But there is simply no California case, officially reported or otherwise, that
4 holds that a putative trustee is subject to the "malice" requirement when sued for what is
5 admittedly its illegal actions. *Kachlon* does not apply.

6
7 **CONCLUSION**

8 For the foregoing reason, claimant respectfully requests that this request be
9 granted.

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11 Dated: February 25, 2015

Respectfully Submitted,

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14 A handwritten signature in black ink, appearing to be 'Alan Moss', is written over a horizontal line. The signature is stylized with a large, sweeping 'A' and a cursive 'M'.

ALAN MOSS

15 *Attorney In Propria Personum*
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PROOF OF SERVICE

COURT: U.S. BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

CASE NAME: RESCAP

ACTION NO.: BANKRUPTCY NO. 12-12020-MG

I am employed in the County of San Francisco, California. I am over the age of 18 and not a party to the within action. On this date, I served the following:

Motion For ReArgument

on the party(ies) set out in said document by causing a true copy thereof to be:

- ☐ Telecopied via facsimile to the addressee's facsimile number listed below per CRC 2008(b).
- ☐ Telecopied via facsimile to the addressee's telephone number listed below, and thereafter mailed according to the procedures set forth immediately hereinbelow.
- ☒ By U.S. priority OVERNIGHT mail, by placing said document(s) in a sealed envelope with first class postage thereon fully prepaid, and then deposited in a U.S. Post Office.
- ☐ By U.S. mail, Return Receipt Requested, by placing said document(s) in a sealed envelope with appropriate postage thereon fully prepaid and then placed in the designated office area for outgoing mail.
- ☐ Delivered by hand to the person set forth below, or by handing said document in a sealed envelope to a messenger service for delivery as addressed.
- ☐ Sent via Priority overnight mailing, by handing said document in a sealed envelope to an agent for the USPS for overnight delivery.

and if mailed, addressed as follows and sent to the following address(es):

Hon. Martin Glenn(Chambers Copy)
Judge of the U.S. Bankruptcy Court in and for the
Southern District of New York
Alexander Hamilton Custom House
One Bowling Green
New York New York 10004-1408

Clerk's Office(Filing Copy)
U.S. Bankruptcy Court in and for the
Southern District of New York
Alexander Hamilton Custom House
One Bowling Green
New York New York 10004-1408

1 Morrison and Foerster LLP
2 ATTN: Norman S. Rosenbaum
3 250 West 55th Street
4 New York New York 10019


5 ResCap Borrowers Trust
6 Polsinelli PC
7 ATTN: Daniel J. Flanigan
8 900 Third Avenue, 21st Floor
9 New York New York 10022

10 Office of the U.S. Trustee for the
11 Southern District of New York
12 ATTN: Linda A. Rifkin & Brian S. Masumoto
13 U.S. Federal Office Building
14 201 Varick Street, Suite 1006
15 New York New York 10014

16 I declare under penalty of perjury under the laws of the State of California that
17 the foregoing is true and correct.

18 Executed this 26th day of February, 2015, at San Francisco, California.

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A handwritten signature in black ink, consisting of several loops and a long horizontal stroke, is written over a horizontal line.